Filed 11/16/12 P. v. Comer CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE LEROI COMER,

Defendant and Appellant.

F063813

(Super. Ct. No. BF138071A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Wiseman, Acting P.J., Cornell, J. and Poochigian, J.

On August 16, 2011, a complaint was filed, charging defendant Jesse Leroi Comer with various offenses arising out of an altercation that occurred on August 12, 2011.[1] On August 29, 2011, defendant entered into a plea agreement pursuant to which he pleaded no contest to assault by means of force likely to produce great bodily injury (Pen. Code,[2] § 245, subd. (a)(1); count 1) and admitted having suffered a 1978 robbery conviction that constituted a "strike" under the "Three Strikes" law (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)).[3] The parties agreed he would receive no more than four years in prison. In return for his plea, the remaining counts and allegations were dismissed, upon the People's motion, with a *Harvey* waiver.[4]

On September 27, 2011, the court denied defendant's request to dismiss the prior strike conviction, and sentenced him to prison for the low term of two years, doubled to four years for the strike. Defendant was ordered to pay restitution and various fees, fines, and assessments. He was awarded 47 days of actual credit, plus 22 days of conduct credit, for a total of 69 days. His request for a certificate of probable cause was subsequently denied.

Defendant now says he is entitled, pursuant to the equal protection clauses of the federal and state Constitutions, to additional custody credits under the amendment to section 4019 that became operative on October 1, 2011. We disagree.

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1 The facts of the offenses are not pertinent to this appeal.

2 All statutory references are to the Penal Code.

3 The legislative and initiative versions of the Three Strikes law were both amended by voter initiative, effective November 7, 2012. As the amendments affect only those individuals with two or more prior serious and/or violent felony convictions (see §§ 667, subd. (e)(2)(A) & (C), 1170.12, subd. (c)(2)(A) & (C)), they do not impact defendant.

4 *People v. Harvey* (1979) 25 Cal.3d 754.

DISCUSSION

Defendant's prior robbery conviction constituted a violent and serious felony. (§§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) Accordingly, at both the time his current crime was committed and the date he was sentenced, he was entitled to presentence custody credits in an amount such that six days were deemed to have been served for every four days he spent in actual custody. (§ 4019, former subds. (b), (c) & (f), as amended by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010; see also § 2933, former subd. (e)(3), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) Defendant was awarded credits calculated by means of this formula.

After defendant was sentenced, but while his appeal was pending, the relevant statutes were amended. Subdivision (e) of section 2933 now deals with forfeited credit. Subdivision (b) of that statute states, in pertinent part: "For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months." (§ 2933, subd. (b), as amended by Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Subdivision (f) of section 4019 provides: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f), as amended by Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, operative Oct. 1, 2011, & Stats. 2011, ch. 39, § 53, eff. June 30, 2011, operative Oct. 1, 2011.) Thus, section 4019 now provides for day-for-day credits for all defendants — including those with prior strike convictions — who serve presentence time in county jail. The only exceptions are defendants with current violent felony or murder convictions. (§§ 2933.1, 2933.2; see *People v. Nunez* (2008) 167 Cal.App.4th 761, 765.)[5]

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[5] Both the legislative and initiative versions of the Three Strikes law contain credit-limiting provisions. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5).) These limits are

Defendant now contends he is entitled to presentence custody credits calculated pursuant to current section 4019. He recognizes the statutory changes from which he seeks to benefit expressly "apply prospectively and … to prisoners who are confined to a county jail … for a crime committed on or after October 1, 2011," while "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) He argues, however, that prospective-only application violates his right to equal protection under the federal and state Constitutions.

In *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*), we recently held the amendment to section 4019 that became operative October 1, 2011 (hereafter the October 1, 2011, amendment) applies only to eligible prisoners whose crimes were committed on or after that date, and such prospective-only application neither runs afoul of rules of statutory construction nor violates principles of equal protection. (*Ellis, supra*, at p. 1548.) In reaching that conclusion, we relied heavily on *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), in which the California Supreme Court held the amendment to section 4019 that became effective January 25, 2010 (hereafter the January 25, 2010, amendment) applied prospectively only. (*Brown, supra*, at p. 318; *Ellis*, *supra*, at p. 1550.)

Brown first examined rules of statutory construction. It observed that "[w]hether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent." (*Brown, supra,* 54 Cal.4th at p. 319.) Where the Legislature's intent is unclear, section 3 and cases construing its provisions require prospective-only application, unless it is "'very clear from extrinsic sources'" that the Legislature intended retroactive application. (*Brown, supra*, at p. 319.) The high court found no cause to

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"inapposite to precommitment credits, i.e., credits awarded prior to commitment to prison. [Citation.]" (*People v. Caceres* (1997) 52 Cal.App.4th 106, 110.)

apply the January 25, 2010, amendment retroactively as a matter of statutory construction. (*Id*. at pp. 320-322.)

Brown also examined *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), which held that when the Legislature amends a statute to reduce punishment for a particular criminal offense, courts will assume, absent evidence to the contrary, the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. (*Brown*, *supra*, 54 Cal.4th at p. 323; *Estrada*, *supra*, at pp. 742-748.) *Brown* concluded *Estrada* did not apply; former section 4019, as amended effective January 25, 2010, did not alter the penalty for any particular crime. (*Brown*, *supra*, at pp. 323-325, 328.) Rather than addressing punishment for past criminal conduct, *Brown* explained, section 4019 "addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Brown*, *supra*, at p. 325.)

In *Ellis*, we determined *Brown*'s reasoning and conclusions apply equally to current section 4019. Accordingly, we held the October 1, 2011, amendment does not apply retroactively as a matter of statutory construction or pursuant to *Estrada*. (*Ellis*, *supra*, 207 Cal.App.4th at pp. 1550, 1551.)

We next turned to the equal protection issue. (*Ellis*, *supra*, 207 Cal.App.4th at p. 1551.) In that regard, *Brown* held prospective-only application of the January 25, 2010, amendment did not violate either the federal or the state Constitution. (*Brown*, *supra*, 54 Cal.4th at p. 328.) *Brown* explained:

> "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, '"[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner."' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.]

> "… [T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. *That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows*." (*Brown, supra,* 54 Cal.4th at pp. 328-329, second italics added.)

The state high court rejected the argument that its decision in *People v. Sage* (1980) 26 Cal.3d 498 compelled a contrary conclusion, declining to read that case as authority for more than it expressly held, namely that authorizing presentence conduct credit for misdemeanants who later served their sentence in county jail, but not for felons who ultimately were sentenced to state prison, violated equal protection. (*Brown, supra,* 54 Cal.4th at pp. 329-330; see *People v. Sage, supra,* 26 Cal.3d at p. 508.) It further refused to find the case before it controlled by *In re Kapperman* (1974) 11 Cal.3d 542, a case that, because it dealt with a statute granting credit for time served, not good conduct, was distinguishable. (*Brown, supra,* at p. 330.)

Once again, we found no reason in *Ellis* why "*Brown*'s conclusions and holding with respect to the January 25, 2010, amendment should not apply with equal force to the October 1, 2011, amendment. [Citation.]" (*Ellis, supra,* 207 Cal.App.4th at p. 1552.) Accordingly, we rejected the defendant's equal protection argument.[6]

Ellis is dispositive of defendant's claim of entitlement to enhanced credits. Defendant's presentence credits were properly calculated.

DISPOSITION

The judgment is affirmed.

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[6] *Ellis* also addressed, and rejected, the additional argument that the defendant nonetheless was entitled to enhanced conduct credits for the period between October 1, 2011, and the date he subsequently was sentenced. (*Ellis, supra,* 207 Cal.App.4th at pp. 1552-1553.) This portion of *Ellis* does not apply to the present case, since defendant was sentenced before the operative date of the October 1, 2011, amendment.